79-1723

No.

Supreme Court, U. S.
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In the

Supreme Court of the United States

LESTER SUTKER, doing business as ALL-STATE DENTAL LABORATORY,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS, ex rel ILLINOIS STATE DENTAL SOCIETY, et al,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Petitioner, LESTER SUTKER, doing business as ALL-STATE DENTAL LABORATORY, through his attorneys, FOSS, SCHUMAN & DRAKE, prays that a Writ of Certiorari be issued to the Illinois Appellate Court, First District, for review of the judgment of that court in this case.

(Opinion Appendix A.1)

A. OPINION BELOW

The opinion of the Illinois Appellate Court is reported at 76 Ill. App.3d 240 and is attached as Appendix A. The Illinois Supreme Court denied the timely Petition of Leave to Appeal in an unreported order, attached as Appendix B.

B. STATEMENT OF JURISDICTION

(i) The Petition is timely filed within ninety days of the Illinois Supreme Court's January 30, 1980 Order denying the Petition for Leave to Appeal.

(ii) There has been no petition for rehearing or request for an extension of time within which to petition for certiorari.

(iii) Jurisdiction is conferred by 28 U.S.C. §1257(3).

C. QUESTIONS PRESENTED FOR REVIEW

(i) Whether the Appellate Court of Illinois erred in concluding that the Illinois Legislature intended that the Dental Practice Act, 18 U.S.C. §1821, apply to transactions that only affect out of state residents who have no contact with Illinois.

(ii) Whether the Appellate Court of Illinois erred in concluding that the Illinois Dental Practice Act, 18 U.S.C. §1821, could constitutionally apply to transactions that only affect out of state residents who have no contact with Illinois.

(iii) Whether the Appellate Court of Illinois erred in concluding that Congress has not pre-empted the applicability of the Illinois Dental Practice Act, 18 U.S.C. §1821, on the sale of dentures through the mail.

D. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal government has exclusive jurisdiction over the mails and it is clear that the federal denture statute, 18 U.S.C. - §1821, constitutes a careful legislative decision barring from the mail only certain types of dentures, not including Defendant's duplicated dentures which are not "constructed from any cast or impression."

E. STATEMENT OF THE CASE

The Defendant is a Dental Technician who has been engaged for thirty-three years in the business of duplicating and repairing prosthetic dentures exclusively by mail from and to customers outside of the State of Illinois.

On September 29, 1978, the court granted the Plaintiff a Summary Judgment that Defendant had engaged in the unauthorized practice of dentistry violating the Illinois Dental Practice Act, (Illinois Revised Statutes, Chapter 91, Sections 60 and 71(a), *et seq.*), that Defendant duplicated dentures in Illinois entirely for out of State customers. No impressions or casts were taken by the Defendant, and the dentures that the Defendant's customers, all of whom lived outside of Illinois, mailed to Defendant were merely duplicated from dentures originally made from impressions by licensed dentists and mailed back by him to the customers. All communications between Defendant and out-of-state customers was conducted entirely through the United States mails.

F. STAGE AT WHICH FEDERAL QUESTION WAS RAISED

The federal question was raised when out-of-state applicability of the Illinois Dental Practice Act to bar denture sales through the federal mails, became an issue in Defendant's pretrial Motion to Dismiss the Complaint.

G. REASONS FOR ALLOWANCE OF THE WRIT

The Illinois Dental Practice Act was not intended to, and constitutionally cannot, reach beyond Illinois borders to bar federally preempted sale of dentures to non-Illinois residents through the mails.

Plaintiff does not contest the federal governments exclusive jurisdiction over the mails and it is clear that the federal denture statute, 18 U.S.C. §1821, constitutes a careful legislative decision barring from the mail only certain types of dentures, not including Defendant's duplicated dentures which are not "constructed from any cast or impression." The federal denture statute was intended to be and must be construed as, a federal preemption of the denture by mail business because the only alternative is to open the issue to conflicting State policies that would impede mail service, "a field in which the federal interest is so dominant that the federal system must be assumed to preclude enforcement of State laws affecting the same subject." *Pennsylvania* v. *Nelson,* 350 U.S. 497, 100 L.Ed. 640 at 653 (1954).

The Appellate Court relied on *Roth* v. *United States,* 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957) and *State* v. *Reader's Digest Association, Inc.,* 81 Wash.2d 259, 501 P.2d 290 (1972), *appeal dismissed,* 411 U.S. 945, 36 L.Ed.2d 406, 93 S.Ct. 1927 (1973). These cases are distinguishable from the case at bar in that they concerned activities which are traditionally malum in se. The *Roth* case involved pornographic materials being advertised, and the *Reader's Digest* case involved gambling through lotteries as a form of unfair competition. The defendant's activities, duplication of dentures is strictly mala prohibitum. The federal interest in this regulating activity is greater than the State's confiicting interest so that the federal denture statutes must be considered a federal preemption of the denture by mail business.

H. CONCLUSION

For the compelling reasons stated above, Petitioner requests that Writ of Certiorari be allowed to resolve the substantial federal question presented.

Respectfully submitted,

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APPENDIX

FIFTH DIVISION
August 24, 1979

No. 79-370

PEOPLE OF THE STATE OF ILLINOIS, ex rel. ILLINOIS STATE DENTAL SOCIETY, an Illinois corporation not for profit, et al.,

Plaintiffs-Appellees,

vs.

LESTER SUTKER, doing business as ALL-STATE DENTAL LABORATORY,

Defendants-Appellants.

Appeal From The Circuit Court Of Cook County.
Honorable NATHAN M. COHEN, *Presiding.*

MR. PRESIDING JUSTICE SULLIVAN delivered the opinion of the court:

Defendant, a dental technician engaged in the repair and duplication of dentures, appeals from the entry of summary judgment against him. In its order, the trial court (1) found that his business activities constituted the unlicensed practice of dentistry, in violation of "An Act to regulate the practice of dental surgery and dentistry * * *" (Ill. Rev. Stat. 1977, ch. 111, par. 2202 *et seq.*) (hereinafter Dental Practice Act); and (2) directed that a writ of injunction issue prohibiting him from continuing such activities. The issues presented are (a) whether defendant was actually practicing dentistry in Illinois and thus subject to the statute's proscriptions, where all his customers were from out of state; (b) whether the application of the Dental Practice Act against defendant exceeds the bounds of the state's police power; and (c) whether federal law has preempted the application of the Dental Practice Act against defendant.

Plaintiffs, in their amended complaint for injunction, alleged that defendant is a dental technician who is not licensed to practice dentistry in Illinois; that he is doing business as All-State Dental Laboratory (All-State) in Chicago; that in the course of such business he has represented himself as being able to test deficiencies of human teeth, advertised that he is able to treat such deficiencies, managed a place where dental operations are performed for compensation, and constructed, reproduced or repaired prosthetic dentures, bridges and other replacements for natural teeth. Additionally, it was alleged that such acts constitute the practice of dentistry under the Dental Practice Act; that defendant has solicited patronage for the practice of dentistry; and that he has practiced dentistry under the name of a corporation or company, in violation of the Dental Practice Act. Plaintiffs requested defendant and his employees be permanently enjoined from all such acts and that costs be awarded pursuant to section 17a of the Dental Practice Act. Ill. Rev. Stat. 1977, ch. 111, par. 2244.

Defendant initially filed a motion to dismiss, which was denied, and plaintiffs then moved for summary judgment —asserting that there were no material questions of fact and that they were entitled to judgment as a matter of law. In support thereof, they submitted portions of defendant's deposition in which he stated that he has never been a licensed dentist; that none of his employees are licensed dentists; that he placed an advertisement for All-State in the Old Farmer's Almanac offering to duplicate dentures by mail order; that All-State is a division of Morse Laboratories, which is owned by defendant and his wife; that All-State handles approximately 2,000 mail orders for dentures per year; and that orders are received from persons in other states but not from Illinois. Two supporting affidavits were also submitted by plaintiffs. The first was that of Mrs. Guy Klepsteen of Davenport, Iowa, stating that she sent a damaged dental plate to All-State with a letter requesting that it be repaired and a duplicate made; that she enclosed therewith a check

for $84.00; and that she subsequently received in the mail from All-State the repaired plate and a duplicate. In the second affidavit, Guy Klepsteen, of Davenport, stated that he sent to All-State a damaged denture, which was provided by the Illinois State Dental Society, along with a letter requesting that the denture be repaired; that he enclosed a check for $34.95, and that he subsequently received from All-State the repaired denture and a check for $24.95 representing a refund for overpayment. Copies of the letters and cancelled checks which the affiants had sent to All-State were submitted with the motion, as well as other portions of defendant's deposition wherein he acknowledged the transaction with Guy Klepsteen.

Defendant then filed his answer to the complaint for injunction and a counterclaim. His answer included affirmative defenses as follows: (a) that since he made dentures only for out-of-state residents, he was not engaged in the practice of dentistry in the State of Illinois and thus was not subject to the statute; (b) that the state's police power cannot extend to regulate his business where his customers are all from out-of-state; and (c) that federal law has preempted the application of Illinois' Dental Practice Act against him.

The trial court entered an order granting plaintiffs' motion to dismiss defendant's affirmative defenses and counterclaim. The same order also granted summary judgment in favor of plaintiffs and enjoined defendant from the practices complained of. Subsequently, in another order, plaintiffs were awarded costs and attorney's fees in the amount of $3,310.95 under section 17a of the Dental Practice Act.

Defendant notices this appeal from those orders but, in his briefs here, does not raise any issue as to the dismissal of his affirmative defenses and counterclaim or as to the award of costs and attorney's fees. He questions only the propriety of the summary judgment.

OPINION

At the outset, we note that the record reveals essentially no dispute as to the facts. The affidavits and deposition excerpts presented on the motion for summary judgment establish that defendant was not a licensed dentist but was the owner and operator of All-State Dental Laboratories which, by means of an advertisement placed in the Old Farmer's Almanac, offered to duplicate dentures by mail order; that All-State handles approximately 2,000 such orders per year—all from out-of-state residents—and, in fact, repaired and duplicated dentures for Mr. and Mrs. Guy Klepsteen, of Iowa, for a fee. It would appear that the trial court found that these acts constituted the practice of dentistry under at least the following subsections of section 3 of the Dental Practice Act:

> "A person practices dentistry, within the meaning of this Act:
>
> • • •
>
> (2) Who is a manager, proprietor operator or conductor of a place where dental operations are performed; or
>
> (3) Who performs dental operations of any kind gratuitously, or for a fee, gift, compensation or reward, paid or to be paid, either to himself or to another person or agency; or
>
> • • •
>
> (9) Who furnishes, supplies, constructs, reproduces or repairs, or offers to furnish, supply, construct, reproduce or repair prosthetic dentures (sometimes known as 'plates'), bridges, or other substitutes for natural teeth, to the user or prospective user thereof; • • •." (Ill. Rev. Stat. 1977, ch. 111, par. 2217.)

Defendant does not challenge the propriety of summary judgment on the basis that any material question of fact existed; rather, his contentions are legal in nature—contending that, for various reasons, the proscriptions of the Dental Practice Act cannot apply to him.

He first argues that because all of his customers were out-of-state residents, he did not actually practice dentistry "within the State of Illinois" and thus was not in violation of the Dental Practice Act. We disagree. Section 3 of the Dental Practice Act provides in relevant part:

> "No person, unless previously registered or licensed to practice dentistry in this State at the time this Act shall become operative, *shall begin the practice of dentistry* or dental surgery, or any branches thereof, without first applying for and obtaining a license for such purpose from the Department of Registration and Education, • • •." (Ill. Rev. Stat. 1977, ch. 111, par. 2206 (emphasis added).)

Activities which constitute "the practice of dentistry" within the context of the Dental Practice Act are set forth in section 5 thereof (Ill. Rev. Stat. 1977, ch. 111, par. 2217), and we note that none of these require that the recipient of the dental services be a resident or citizen of Illinois. We accordingly conclude that the fact that defendant's customers were not Illinois residents did not remove him from the proscriptions of the Dental Practice Act.

Defendant next maintains that the Dental Practice Act cannot be applied as against him within permissible constitutional bounds. As this court stated in *Marketlines, Inc.* v. *Chamberlain* (1965), 63 Ill.App.2d 274, 211 N.E.2d 399:

> "[A] state, acting under its own police powers, can control and regulate the activities of those engaged in interstate commerce under the following conditions:
>
> 1. Where the regulation is a proper subject of the state's police power.
>
> 2. Where those to be controlled are 'doing business within the state.'
>
> 3. Where the regulation does not inflict an undue burden on interstate commerce.

4. Where the activity to be regulated has not been preempted by the Federal government." (63 Ill. App.2d at 279-80, 211 N.E.2d at 401-02.)

Defendant attacks the application of the Dental Practice Act on two of the four above grounds. First, he argues that applying the Act against him exceeds the permissible bounds of the state's police power. He points to the familiar definition of the police power as the authority possessed by the government to enact legislation for the benefit of the "public welfare, safety, and health of the citizens of the State, * * * the power * * * being founded on the duty of the State to protect its citizens" (16 C.J.S. *Constitutional Law* § 175 (1956)), and he takes the position that since all of his customers are out-of-state residents, Illinois has no duty to protect them and thus could not regulate the rendering of dental services to such out-of-state persons under the police power.

We note that the Dental Practice Act has been declared to be a proper exercise of the police power. (*People ex rel. Chicago Dental Society* v. *A.A.A. Dental Laboratories, Inc.* (1956), 8 Ill.2d 330, 134 N.E.2d 285, *appeal dismissed* (1956), 352 U.S. 863, 1 L.Ed. 2d 73, 77 S.Ct. 97; *People ex rel. Watson* v. *Spinka* (1978), 58 Ill. App.3d 729, 374 N.E.2d 787; *People ex rel. Illinois State Dental Society* v. *Vinci* (1976), 35 Ill.App.3d 474, 342 N.E.2d 206.) However, there is no indication as to whether the customers of the defendants in those cases were out-of-state residents. The specific challenge raised by defendant in the instant case does not appear to have been previously considered, and it is thus necessary to review the relevant principles involved. In this regard, it is clear that the police power is the sovereign authority of the state to pass laws which are designed to protect the health, safety, welfare or morals of the public. (*Chicago & Alton R.R. Co.* v. *Tranbarger* (1915), 238 U.S. 67, 59 L.Ed. 1204, 35 S.Ct. 678; *Bacon* v. *Walker* (1907), 204 U.S. 311, 51 L.Ed. 499, 27 S.Ct. 289), and this includes the power of the state to require that only persons possessing reasonable qualifications may engage in the practice of a profession such as dentistry (*Semler* v. *Oregon State Board of Dental Examiners* (1935), 294 U.S. 608, 79 L.Ed. 1086, 55 S.Ct. 570; *Graves* v. *Minnesota* (1926), 272 U.S. 425, 71 L.Ed. 331, 47 S.Ct. 122). "[T]he standard of a proper exercise of the police power is whether the statute is reasonably designed to remedy the evils which the legislature has determined to be a threat to the public health, safety and general welfare" (*Heimgaertner* v. *Benjamin Electric Mfg. Co.* (1955), 6 Ill.2d 152, 159, 128 N.E.2d 691, 695), and "the measures adopted must be reasonably necessary and appropriate for the accomplishment of legitimate objects within the domain of the police power" (*People* v. *Witte* (1925), 315 Ill. 282, 285, 146 N.E. 178, 180; see also, *East Side Levee and Sanitary District* v. *East St. Louis and Carondelet Ry.* (1917), 279 Ill. 123, 116 N.E. 720). The state has wide discretion in determining what measures are necessary to promote the safety and welfare of its people (*Terrace* v. *Thompson* (1923), 263 U.S. 197, 68 L.Ed. 255, 44 S.Ct. 15), and debatable questions as to the reasonableness of police regulations are for the legislature, not the courts, to resolve (*Sproles* v. *Binford* (1932), 286 U.S. 374, 76 L.Ed. 1167, 52 S.Ct. 581), subject to the restriction that all exercises of the police power must be made within constitutional bounds (*Panhandle Eastern Pipe Line Co.* v. *State Highway Commission* (1935), 294 U.S. 613, 79 L.Ed. 1090, 55 S.Ct. 553; *Witte*).

Turning to the case at bar, we note that the General Assembly, in enacting the Dental Practice Act, made the following legislative declaration:

> "The practice of dentistry in the State of Illinois is hereby declared to effect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of Illinois." (Ill. Rev. Stat. 1977, ch. 111, par. 2202.)

As stated above, the state may, as a legitimate object of the police power, protect the public by requiring individuals who provide dental services to meet certain qualifications. Thus, the relevant inquiry is whether the Dental Practice Act is a reasonable and appropriate means of accomplishing such protection of the public. We believe that it is. The requirement that all individuals within the state who provide dental services to anyone must be licensed is an effectively appropriate means of protecting the people of Illinois from unqualified practitioners. While it is true that the effect of the statute would also prevent an unlicensed individual from rendering dental services for persons who are not citizens of Illinois and whom the state has no duty to protect, we do not feel that this result requires a finding that the legislature has acted beyond the permissible scope of its police power. We emphasize at this point, however, that such out-of-state individuals are not being "regulated" by the statute but are merely beneficiaries of the protection afforded by it. We know of no case, and defendant has cited none, which would indicate that a statute which otherwise is a valid exercise of the police power must be held invalid because its protection incidentally extends to out-of-state citizens. This reasoning leads us to the belief that the application of the Dental Practice Act against defendant was not an abuse of the police power.

Secondly, defendant attacks the application of the Dental Practice Act against him on the ground that it has been preempted by the following federal statute:

> "Whoever transports by mail or otherwise to or within the District of Columbia, the Canal Zone or any Possession of the United States or uses the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory any set of artificial teeth or prosthetic dental appliance or other denture, constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed to practice dentistry under the laws of the place into which such denture is sent or brought, where such laws prohibit:
>
> (1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under such laws to practice dentistry;
>
> (2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under such laws to practice dentistry; or
>
> (3) the construction or supply of dentures from impressions or casts made by a person not licensed under such laws to practice dentistry—
>
> Shall be fined not more than $1,000 or imprisoned not more than one year." (18 U.S.C. § 1821 (1976).)

Defendant posits that this statute has suspended the power of the states to enact legislation concerning the mailing of dentures and that the Dental Practice Act therefore cannot be invoked against him because all of his transactions were conducted through the mail. We disagree. We view the facts of the instant case as being analogous to those presented in *Roth* v. *United States* (1957), 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304. There, a California statute prohibited the keeping or advertising of obscene or indecent material, and a federal statute proscribed the mailing of obscene materials. In response to an argument that Congress, in enacting the federal law, preempted the regulatory field and thus nullified the California statute, the United States Supreme Court stated:

> "The federal statute deals only with actual mailing; it does not eliminate the power of the state to punish 'keeping for sale' or 'advertising' obscene material. The state statute in no way imposes a burden or interferes with the federal postal functions. '. . . The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulations involved a direct, physical interference with federal activities

> under the postal power or some direct, immediate burden on the performance of the postal functions. . . .' [Citation.]'' 354 U.S. at 493-94, 1 L.Ed.2d at 1512, 77 S.Ct. at 1314.)

Similarly, in *State* v *Reader's Digest Association, Inc.* (1972), 81 Wash.2d 259, 501 P.2d 290, *appeal dismissed* (1973), 411 U.S. 945, 36 L.Ed.2d 406, 93 S.Ct. 1927, the court held that the Reader's Digest Sweepstakes violated Washington's Consumer Protection Act (RCW 19.86.020), which prohibited unfair methods of competition. The court rejected the contention that Congress, in enacting legislation concerning the use of mails in lotteries, preempted the field, stating:

> ''While it is true the state is without power to regulate the mail, it is not powerless to prevent respondent from using unfair trade practices within its borders. [Citation.] The state cannot enjoin the mails, but it can enjoin respondent from conducting the Sweepstakes within its borders, subjecting respondent to the penalties of the Consumer Protection Act for refusal to comply.'' (81 Wash.2d at 278, 501 P.2d at 303.)

In the case at bar, as in *Roth* and *Reader's Digest Association,* the state statute in question does not impose a burden upon or interfere with the mails, but merely regulates the activities of those persons in the state who seek to practice dentistry. Thus, we find that the General Assembly, in enacting the Dental Practice Act, has not encroached an area governed by federal law, and we conclude that Congress has not preempted the application of the Dental Practice Act against defendant.

For the reasons stated, the judgment of the trial court is affirmed.

Affirmed.

LORENZ and MEJDA, JJ., concur.

ILLINOIS SUPREME COURT
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January 30, 1980

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No. 52649 - People ex rel. Illinois State Dental Society, an Illinois corporation not for profit, et al., respondents, vs. Lester Stuker, etc., petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Clell L. Woods
Clerk of the Supreme Court

Supreme Court, U. S.
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RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

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IN THE

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Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS, ex rel ILLINOIS STATE DENTAL SOCIETY, et al.,

Respondents.

RESPONDENTS' BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT

Respondents, People of the State of Illinois, ex rel. Illinois State Dental Society, et al., through their attorneys, Russell M. Pelton, Jr. and Patricia Chapin, pray that this court deny the issuance of a Writ of Certiorari to the Illinois Appellate Court, First District, for review of the judgment of that court in this case.

A. QUESTIONS PRESENTED FOR REVIEW

(i) WHETHER the Illinois Dental Practice Act, Ill. Rev. Stat. 1977, Ch. 111, par. 2202 et. seq., which otherwise is a valid exercise of the police power, must be held invalid because its protection incidentally extends to out-of-state citizens.

(ii) WHETHER the Traynor Act, 18 U.S.C. § 1821, pre-empts the Illinois Dental Practice Act, Ill. Rev. Stat. 1977, ch. 111, par. 2202, et. seq.

B. STATUTORY PROVISIONS INVOLVED

1977 Ill. Rev. Stat. ch. 111:

§ 2202. Legislative declaration—Liberal construction.] § 1a. The practice of dentistry in the State of Illinois is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of Illinois. This Act shall be liberally construed to carry out these objects and purposes.

§ 2206. Necessity of license—Application—Fee—Eligibility—Examination.] § 3. No person, unless previously registered or licensed to practice dentistry in this State at the time this Act shall become operative, shall begin the practice of dentistry or dental surgery, or any branches thereof, without first applying for and obtaining a license for such purpose from the Department of Registration and Education, hereinafter referred to as the "department. • • •"

§ 2217. Practice of dentistry—Acts constituting —Prima facie evidence—Exemptions.] § 5. A person practices dentistry, within the meaning of this Act:

(1) Who uses a dental degree, or designation, or card, device, directory, sign, or other media whereby he represents himself as being able to diagnose, treat, prescribe, or operate for any disease, pain, deformity, deficiency, injury, or physical condition of the human tooth, teeth, alveolar process, gums or jaw; or

(2) Who is a manager, proprietor, operator or conductor of a place where dental operations are performed; or

(3) Who performs dental operations of any kind gratuitously, or for a fee, gift, compensation or reward, paid or to be paid, either to himself or to another person or agency; or

(4) Who uses a roentgen or X-Ray machine for dental treatment, roentgenograms or for dental diagnostic purposes; or

(5) Who extracts a human tooth or teeth, or corrects or attempts to correct malpositions of the Human teeth or jaws; or

(6) Who offers and undertakes, by any means or method, to diagnose, treat or remove stains or concretions (accretions) from human teeth or jaws; or

(7) Who uses or administers local or general anesthetics in the treatment of dental or oral diseases or in any preparation incident to a dental operation of any kind of character; or

(8) Who takes impressions of the human tooth, teeth, or jaws or performs any phase of any operation incident to the replacement of a part of a tooth, a tooth, teeth or associated tissues by means of a filling, crown, a bridge, a denture or other appliance; or

(9) Who furnishes, supplies, constructs, reproduces or repairs, or offers to furnish, supply, construct, reproduce or repair prosthetic dentures (sometimes known as "plates"), bridges or other substitutes for natural teeth, to the user or prospective user thereof; or

(10) Who performs any clinical operation included in the curricula of recognized dental schools and colleges.

The fact that any person engages in or performs, or offers to engage in or perform, any of the practices, acts, or operations set forth in this Section, shall be prima facie evidence that such person is engaged in the practice of dentistry. . . .

C. STATEMENT OF THE CASE

The Defendant is engaged in business as All-State Dental Laboratories (or Laboratory, as sometimes appears) in Chicago, Illinois. Neither he nor any of his employees are licensed dentists. Defendant is the owner and operator of All-State Dental Laboratories, which, by means of advertisements placed in the *Old Farmer's Almanac* has offered to duplicate dentures by mail-order.

All-State handles approximately 2,000 such orders per year—all from out-of-state residents. In particular, it is uncontested that All-State repaired and duplicated dentures for Mr. and Mrs. Guy Klepsteen, of Iowa, for a fee.

On September 29, 1978, the trial court granted summary judgment to Plaintiffs and enjoined the Defendant from the illegal practice of dentistry. The trial court found that the Defendant's business of repairing and/or reproducing dentures by mail constituted the practice of dentistry in Illinois.

The trial court found that Defendant was practicing dentistry under at least the following Subsections of Section 3 of the Illinois Dental Practice Act:

"A person practices dentistry, within the meaning of this Act:

• • •

(2) Who is a manager, proprietor, operator or conductor of a place where dental operations are performed; or

(3) Who performs dental operations of any kind gratuitously, or for a fee, gift, compensation or reward, paid or to be paid, either to himself or to another person or agency; or

• • •

(9) Who furnishes, supplies, constructs, reproduces or repairs, or offers to furnish, supply, construct, reproduce or repair prosthetic dentures (sometimes known as 'plates'), bridges, or other substitutes for natural teeth, to the user or prospective user thereof; • • •." (Ill. Rev. Stat. 1977, ch. 111, par. 2217.)

Contrary to the Petitioner's assertion to this Court, there was no finding below that impressions or casts were not taken by Defendant. Nor was there any evidence that the dentures duplicated by Defendant were originally made from impressions made by licensed dentists.

REASONS FOR DENYING WRIT

1. The Illinois Dental Practice Act is a constitutional exercise of the state's police power.

The constitutionality of the Illinois Dental Practice Act has been repeatedly tested and upheld as have similar statutes in numerous other states. There has been no conflict in the federal decisions interpreting these statutes. Therefore, there is no reason for this Court to grant a Writ of Certiorari.

As U.S. District Judge John Powers Crowley recently observed in discussing the Illinois Dental Practice Act, "One would be hard pressed to imagine a situation in which the validity of a statute was more clearly defined." *Schiller* v. *Illinois State Dental Society,* 78 C 3936 (Slip Opinion, N.D. Ill. April 6, 1979). Judge Crowley's opinion in *Schiller,* upholding the constitutionality of the Illinois Dental Practice Act, was based, inter alia, on the following cases: *People ex rel. Chicago Dental Society* v. *A.A.A. Dental Laboratories, Inc.,* 8 Ill.2d 330, 134 N.E.2d 285 (1956), appeal dismissed, 352 U.S. 863, 1 L.Ed.2d 73, 77 S.Ct. 97 (1956); *People ex rel. Watson* v. *Spinka,* 729, 374 N.E.2d 787 (1978); *People ex rel. Illinois State Dental Society* v. *Vinci,* 35 Ill.App.3d 474, 342 N.E.2d 206 (1976); *Duncan* v. *Ward,* 225 F.Supp. 195 (N.D. Ill. 1963). These cases unquestionably establish that the requirement of licensure of all individuals within Illinois who provide dental services to anyone, is an effectively approprate means of protecting the people of Illinois from unqualified practitioners; i.e. the Illinois Dental Practice Act is Constitutional as it is wthn the state's police power.

Likewise, other states' dental practice acts, quite similar to Illinois', have had their federal constitutionality recently tested and upheld under the rationale of the state's police power; see e.g. *Manders* v. *Stillwill,* C77-1345A (Slip Opinion, N.D.Ga. February 13, 1978); and *Gambrel* v. *Kentucky Dental Board,* C-78-0184 L(A) (Slip Opinion, W.D.Ky. April 3, 1980). All three of these opinions are included in the appendix to this brief. Although Respondents realize that these opinions are not binding on this Court, Respondents feel that their rationale is persuasive.

Before considering the issues that are in dispute here, it is important for the Court to keep in mind what is *not* in dispute.

First of all, there is no question that Lester Sutker and his employees are not licensed as dentists in Illinois.

Secondly, the Petitioner herein admittedly does not question the validity and constitutionality of the Illinois Dental Practice Act as it is applied to those Illinois residents "practicing dentistry" on Illinois residents.

Thirdly, Petitioner, an Illinois resident, does not dispute that the acts admittedly committed by Petitioner and complained of herein, if performed on Illinois residents, would constitute the "practice of dentistry" and would therefore be illegal when performed by Petitioner.

Specifically, aside from the issue of patient residency, it is undisputed that Petitioner is "practicing dentistry" under at least the following subsections of section 3 of the Illinois Dental Practice Act:

"A person practices dentistry, within the meaning of this Act:

• • •

(2) Who is a manager, proprietor operator or conductor of a place where dental operations are performed; or

(3) Who performs dental operations of any kind gratuitously, or for a fee, gift, compensation or reward, paid or to be paid, either to himself or to another person or agency; or

• • •

(9) Who furnishes, supplies, constructs, reproduces or repairs, or offers to furnish, supply, construct, reproduce or repair prosthetic dentures (sometimes known as 'plates'), bridges, or other substitutes for natural teeth, to the user or prospective user thereof; • • •." (Ill. Rev. Stat. 1977, ch. 111, par. 2217.)

Therefore, Petitioner's sole argument regarding the constitutionality of the Illinois Dental Practice Act is that a statute which otherwise is a valid exercise of the police power must be held invalid because its protection incidentally extends to out of state citizens. However, other than this bald allegation, Petitioner presents no argument nor citation of authority in support of his position.

Indeed, Petitioner ignores the clear language of the Illinois Dental Practice Act, which posits its regulation in terms of the residency and place of business of the practitioner, and not in terms of the residency of the patient. The statutory legislative declaration quite clearly states:

> "The *practice of dentistry in the State of Illinois* is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and *that only qualified persons be permitted to practice dentistry in the State of Illinois.*" (Ill. Rev. Stat. 1977, ch. 111, par. 2202.) (Emphasis supplied.)

Since the "practice of dentistry" is a defined term, see Section 3 of the Illinois Dental Practice Act set out above, it is the commission of any of those acts *in the state of Illinois* that is prohibited. Note that none of the statutory references cited above which define the "practice of dentistry" require that the recipient of the dental services be a resident or citizen of Illinois. Therefore, it is obvious that the Illinois Dental Practice Act, which otherwise is a valid exercise of the police power, is not invalid because its protection incidentally extends to out-of-state citizens.

2. The Illinois Dental Practice Act is not pre-empted by the Federal Traynor Act.

Petitioner's remaining argument, that the Illinois Dental Practice Act has been pre-empted by the Traynor Act, 18 U.S.C. §1821, has likewise been dealt with conclusively and is therefore inapposite for a writ of certiorari from the United States Supreme Court.

In affirming a conviction under the Traynor Act, the 7th Circuit Court of Appeals has correlated that Act with the individual state's dental practice acts in the following language:

> [The federal statute] prohibits the mailing of dentures made from impressions taken by unauthorized persons into any state, like Michigan, seeking 'to protect their citizenry from the lay public's practice

> of dentistry,' *and the federal section is a cooperative endeavor to bolster state policy.* (emphasis supplied). U. S. v. Patterson, 314 F.2d 491, 494 (7th Cir., 1963)

It is therefore apparent that no pre-emption of Illinois' police power regarding matters of the public health was intended by the Traynor Act.

The instant case is directly analogous to *Roth* v. *United States,* 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957). In *Roth,* a California statute prohibited the keeping or advertising of obscene or indecent material, and a federal statute proscribed the mailing of obscene materials. In response to an argument that Congress, in enacting the federal law, pre-empted the regulatory field and thus nullified the California statute, the United States Supreme Court stated:

> "The federal statute deals only with actual mailing; it does not eliminate the power of the state to punish 'keeping for sale' or 'advertising' obscene material. The state statute in no way imposes a burden or interferes with the federal postal functions. '. . . The decided cases which indicate the limits of state regulatory power in relation to the federal mail service involve situations where state regulations involved a direct, physical interference with federal activities under the postal power or some direct. immediate burden on the performance of the postal functions.' " (354 U.S. at 493-94, 1 L.Ed.2d at 1512, 77 S.Ct. at 1314.)

Petitioner's only response to *Roth, supra,* is that it is distinguishable because it deals with a subject which is malum in se (obscenity) rather than malum prohibitum. This argument is unsubstantiated by Petitioner. Indeed, the legislative designation of obscenity is not malum in are not distinguishable.

se, like murder, but is merely malum prohibitum, like the prohibition against the unlicensed practice of dentistry in the instant case. Therefore, *Roth* and the instant case

For the reasons stated above, there is no basis in law or fact to support the argument that the Illinois Dental Practice Act is unconstitutional as applied to the Petitioner, or the argument that the federal Traynor Act has pre-empted the application of the Illinois Dental Practice Act in this matter; and therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

ILLINOIS REVISED STATUTES
CHAPTER 111 - PROFESSIONS AND OCCUPATIONS
Conversion Table From Chapter 91
(Illinois Dental Practice Act)

Ill.Rev.Stat. 1975 Ch. 91 Sec.	Ill.Rev.Stat. 1977 Ch. 111 Sec.	Ill.Rev.Stat. 1975 Ch. 91 Sec.	Ill.Rev.Stat. 1977 Ch. 111 Sec.
56a	2202	62e	2229
57	2203	62f	2230
57a	2204	62g	2231
57b	2205	62h	2232
58	2206	62i	2233
58a	2207	63	2234
58b	2208	64	2235
58c	2209	65	2236
58d	2210	66	2237
59	2211	67	2238
59.1	2212	68	2239
59a	2213	69	2240
59b	2214	69a	2241
59c	2215	70	2242
59d	2216	71	2243
60	2217	71a	2244
60a	2218	71b	2245
60b	2219	72	2246
60c	2220	72a	2247
61	2221	72b	2248
62	2222	72c	2249
62.1	2223	72d	2250
62.2	2224	72e	2251
62a	2225	72f	2252
62b	2226	72g	2253
62c	2227	72h	2254
62d	2228	72i	2255

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

HELEN SCHILLER, WALTER COLEMAN, UPTOWN PEOPLES COMMUNITY SERVICE CENTER, an Illinois not-for-profit corporation; UPTOWN PEOPLES COMMUNITY HEALTH SERVICES BOARD OF DIRECTORS, INC., an Illinois not-for-profit corporaation; SAMUEL ABERNATHY and other individuals listed on Exhibit "47" of the Complaint; and GARY HINTON, et al.,

Plaintiffs,

vs.

THE ILLINOIS STATE DENTAL SOCIETY, an Illinois not-for-profit corporation, THE CHICAGO DENTAL SOCIETY, an Illinois not-for-profit corporation, et al.,

Defendants.

NO. 78 C 3936

MEMORANDUM OPINION AND ORDER

John Powers Crowley, District Judge

This case involves the constitutionality and legality of the Illinois Dental Practice Act, Ill. Rev. Stat., Ch. 111, §2202, et seq., and the methods used to enforce that Act.

The plaintiffs are two individual residents and two not-for-profit Uptown community organizations that are either "concerned", "devoted" or have as their "principal purpose" the dental health care needs of the poor of that area,[1] and several hundred individuals whose names are enumerated in Exhibit 47 and who are "present and potential consumers of dentures and denture services." In addition, various denturists[2] are plaintiffs, and the majority of the alleged wrongful acts of defendants pertain solely to this group.

Defendants are the Illinois State Dental Society and the Chicago Dental Society,[3] the Illinois Dental Laboratory Association,[4] and various individual defendants who are 1) all present or former officers of the Illinois State Dental Society; 2) the program director of the Illinois State Dental Society; and 3) presumably various

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[1] The organizations are Uptown People's Community Service Center and Uptown People's Community Health Service Board of Directors.

[2] Denturists are allegedly persons who are trained to make, fit and repair dentures.

[3] Both of these organizations are dentists' trade associations.

[4] Plaintiffs have failed to name the Illinois Dental Laboratory Association as a defendant in the caption of the complaint, although that organization is mentioned as a defendant in paragraph 3. The Illinois Dental Laboratory Association has moved to dismiss the cause against it on the ground that plaintiffs have failed to comply with Fed. R. Civ. P. 10(a). In light of the conclusion we reach in this case, it is unnecessary to decide this issue.

other dentists whom the complaint depicts merely as residents and citizens of Illinois.

Defendants have moved to dismiss the complaint on a variety of grounds. They challenge this Court's jurisdiction, claiming that plaintiffs have failed to establish a substantial federal question. Defendants also assert that the non-denturist plaintiffs lack standing to bring this action; that the action is barred by the equitable doctrine of unclean hands, the federal anti-injunction statute, 28 U.S.C. §2283, the statute of limitations and the doctrines of res judicata and abstention. In addition, defendants contend that the complaint should be dismissed, because it violates Fed. R. Civ. P. 8.

The complaint, which is hardly the short, concise statement intended by Rule 8, lists not only the purported wrongful acts of these defendants, but also sets forth a comprehensive history of the dental profession and the sociological and economic impact of the Illinois statute. This Court, however is concerned only with the factual allegations relevant to the causes of action set forth and the legal issues that arise from them.

The Illinois Dental Practice Act. Ill. Rev. Stat. Ch. 111, §2202 et seq., is a comprehensive statutory scheme regulating dentistry and various aspects of dental health care in Illinois. The Act prohibits the practice of dentistry without a license.[5] Among acts which constitute the practice of dentistry are taking of impressions, replacing teeth, and making and repairing dental pros-

[5] Ill. Rev. Stat. Ch. 111, §2242:
PENALTY FOR UNLAWFUL PRACTICE
Any person who practices or offers to practice dentistry in this State without being licensed for that purpose, or whose license has been suspended or revoked, or who violates any of the provisions of this Act, for which no specific penalty has been provided herein, is guilty of a Class A misdemeanor.

theses.[6] However, the Act exempts, from that definition, the extraoral construction or repair of dentures and bridges, or replacement of teeth when those services are

[6] Ill. Rev. Stat., Ch. 111, §2217:
PRACTICE OF DENTISTRY — ACTS CONSTITUTING — PRIMA FACIE EVIDENCE — EXEMPTIONS
A person practices dentistry, within the meaning of this Act:
. . .
(8) Who takes impressions of the human tooth, teeth, or jaws or performs any phase of any operation incident to the replacement of a part of a tooth, a tooth, teeth or associated tissues by means of a filling, crown, a bridge, a denture or other appliance; or
(9) Who furnishes, supplies, constructs, reproduces or repairs, or offers to furnish, supply, construct, reproduce or repair prosthetic dentures (sometimes known as "plates"), bridges or other substitutes for natural teeth, to the user or prospective user thereof;
. . .
The following practices, acts, and operations, however, are exempt from the operation of this Act:
. . .
(f) The performance of any dental service by an appropriately trained dental assistant, if such service is performed under the direction and immediate supervision and full responsibility of a dentist licensed under this Act, provided, however, that such persons shall not be allowed to perform or attempt to perform any of the following services:
. . .
(6) Any and all taking of impressions for the fabrication of orthodontic appliances, prosthetic appliances, space maintainers, crowns, bridges, splints, inlays, onlays, or other restorative or replacement dentistry.

requested by a licensed dentist[7], and that request is made on a written work order.[8] Soliciting or providing those

[7] Ill. Rev. Stat. Ch. 111, §2218:
MANUFACTURE OF DENTURES, BRIDGES OR REPLACEMENTS FOR LICENSED DENTISTS — ADVERTISEMENTS
Licensed dentists may employ or engage the services of any person, firm or corporation to construct or repair, extraorally, prosthetic dentures, bridges, or other replacements for a part of a tooth, a tooth, or teeth. A person, firm or corporation, so employed or engaged, when constructing or repairing such dentures, bridges or replacements, exclusively, directly and solely for licensed members of the dental profession, and not for the public or any part thereof, shall not be deemed or considered to be practicing dentistry as defined in this Act.

[8] Ill. Rev. Stat. Ch. 111, §2219:
MANUFACTURE OF DENTURES, BRIDGES OR REPLACEMENTS FOR LICENSED DENTISTS — WORK ORDER — SUB-WORK ORDER — PENALTIES
(1) Any licensed dentist who employs or engages the services of any person, firm or corporation to construct or repair, extraorally, prosthetic dentures, bridges, or other replacements for a part of a tooth, a tooth, or teeth, shall furnish such person, firm or corporation with a written work order on forms prescribed by the Department of Registration and Education which shall contain: (a) the name and address of the person, firm or corporation to which the work order is directed. (b) The patient's name or identification number. If a number is used, the patient's name shall be written upon the duplicate copy of the work order retained by the dentist. (c) The date on which the work order was written. (d) A description of the work to be done, including diagrams if necessary. (e) A specification of the type and quality of materials to be used. (f) The signature of the dentist and the number of his license to practice dentistry.

services without first supplying or obtaining a written work order constitutes a misdemeanor.[9] In addition, the

[8] (Continued)
(2) The person, firm or corporation receiving a work order from a licensed dentist shall retain the original work order and the dentist shall retain a duplicate copy thereof for inspection at any reasonable time by the Department of Registration and Education or its duly authorized agents, for a period of 3 years in both cases.
(3) If the person, firm or corporation receiving a written work order from a licensed dentist engages another person, firm or corporation (hereinafter referred to as "subcontractor") to perform some of the services relative to such work order, he or it shall furnish a written sub-work order with respect thereto on forms prescribed by the Department of Registration and Education which shall contain: (a) The name and address of the subcontractor. (b) A number identifying the subwork order with the original work order, which number shall be endorsed on the work order received from the licensed dentist. (c) The date on which the sub-work order was written. (d) A description of the work to be done by the subcontractor, including diagrams if necessary. (e) A specification of the type and quality of materials to be used. (f) The signature of the person, firm or corporation issuing the sub-work order. The subcontractor shall retain the sub-work order and the issuer thereof shall retain a duplicate copy, attached to the work order received from the licensed dentist, for inspection by the Department of Registration and Education or its duly authorized agents, for a period of 3 years in both cases.

[9] Ill. Rev. Stat. Ch. 111, §2219:
(4) Any licensed dentist who: (a) employs or engages the services of any person, firm or corporation to construct or repair, extraorally, prosthetic dentures, bridges, or other dental appliances without first providing such person, firm, or corporation with a

Act prohibits public advertisement of the products or services of firms performing extraoral work for licensed dentists.[10]

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[9] (Continued)

written work order; or (b) fails to retain a duplicate copy of the work order for 3 years; or (c) refuses to allow the Department of Registration and Education or its duly authorized agents, to inspect his files of work orders, is guilty of a Class A misdemeanor and the Department of Registration and Education may revoke or suspend his license therefor.

(5) Any such person, firm or corporation, who: (a) furnishes such services to any licensed dentist without first obtaining a written work order therefor from such dentist; or (b) acting as a sub-contractor as described in (3) above, furnishes such services to any person, firm or corporation, without first obtaining a written sub-work order from such person, firm or corporation; or (c) fails to retain the original work order or sub-work order, as the case may be, for 3 years; or (d) refuses to allow the Department of Registration and Education or its duly authorized agents, to inspect his or its files or work orders or sub-work orders, is guilty of a Class A misdemeanor.

[10] Ill. Rev. Stat. Ch. 111, §2218:

. . .

However, it is unlawful for persons, firms or corporations so employed or engaged [rendering services under licensed dentist work order], *to advertise in any manner the appliances constructed or repaired, or the services rendered in the construction, repair or alteration thereof, except, that persons, firms or corporations so employed may announce in trade journals and professional publications which circulate among members of the dental profession, their names, the locations or places of their business, their office hours, telephone numbers, and the fact that they are engaged in the construction, reproduction or repair of such appliances, together with such display advertisements as disclose the character and application of their work, and persons, firms or corporations*

The complaint is filled with facts and statistics about the need for low cost dental health care. In essence, those claims are that persons in need of dentures are concentrated among the poor and elderly, and that the inflated prices charged by dentists place the cost of dental health care beyond their means. The complaint avers that a large majority of dentists do not construct dentures for their patients; they send orders to dental technicians who are trained to make and fit dentures. Plaintiffs assert that denturism is a profession independent of dentistry; that as uniquely trained professionals, denturists are capable of directly rendering their services to the public without endangering the public health, and with the effect of providing services comparable to those given by dentists at a fraction of the cost.

Generally, the complaint is divided among allegations relating to the denturist plaintiffs and the consumer

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[10] (Continued)

so employed or engaged may furnish to licensed dentists information regarding their products, materials, uses and prices therefor. Announcement may also be made by business card, in business and telephone directories, and by signs located upon the premises wherein the place of business is situated, but announcements made by business card or in business and telephone directories and signs shall not contain any amount as a price or fee for the services rendered, or to be rendered, or for any material or materials used or to be used, or any picture or other reproduction of a human head, mouth, denture or specimen of dental work or any other media calling attention of the public to their business. Announcements in business and telephone directories shall be limited to name, address and telephone number, and shall not occupy more than the number of lines necessary to disclose such information. The lettering on signs shall be no more than 7 inches in height and no illuminated or glaring light signs shall be used.

plaintiffs and antitrust and constitutional violations. The antitrust allegations pertaining to the denturist plaintiffs are that the defendants exercise a monopoly over, and thus, are able to charge monopoly prices for, dentures and the services required for fitting dentures in violation of §2 of the Serman Act,[11] and that defendants have entered in a contract, combination and conspiracy in restraint of trade.[12]

The constitutional challenges are that the Illnois Dental Practice Act violates denturists' equal protection and due process rights because it prevents them from practicing their profession directly with the public; that the statute violates their rights to be free from involuntary servitude as guaranteed by the thirteenth amendment as their ability to engage in their profession is subrogated to control by dentists; that the Act infringes on denturists' First Amendment right to disseminate useful commercial information about their products and services; that this infringement of their constitutional rights in turn causes a violation of their equal protection and due process rights; that defendants have entered into a conspiracy to deprive denturists of equal protection and privileges under the laws and their First Amendment rights to speak and petition the legislature in violation of 42 U.S.C. §1985(3). Plaintiffs also charge defendants with violation of their right to equal privileges and immunities under the law. 42 U.S.C. §1983.[13]

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[11] 15 U.S.C. §2.

[12] 15 U.S.C. §1.

[13] Count VII of the complaint purports to state a claim under 42 U.S.C. §1983(3). The allegations, however, state that defendants have entered into a conspiracy to deprive plaintiffs to equal privileges and immunities under the laws. Section 1983 does not contain any subsections, nor does that statute provide a cause of action for conspiracy. Thus, it is impossible to determine on which civil rights statute the claim is based.

In addition, the complaint avers that defendants have engaged in acts that constitute unlawful business practices, unlawful competition and interference with contractual relationships contrary to Illinois law.

Only Counts XII and XIII pertain to the consumer plaintiffs, the Uptown organizations and concerned residents. Essentially they charge defendants with violation of the federal anti-trust laws, alleging that consumers are forced to pay monopolistic prices for dentures and dental services.

As one of the grounds presented in defendants' motion to dismiss is a challenge to this Court's jurisdiction, and this contention bears on the inherent power of the court to entertain the controversy, it is imperative to resolve this issue.

It is undisputed that diversity of citizenship is not an alternate basis for jurisdiction in this case since all parties are citizens of Illinois. Plaintiffs claim that our jurisdiction is founded on various federal statutes and the doctrine of pendant and ancillary jurisdiction. Defendants answer that since all of plaintiffs' claims are without merit, there is no substantial federal question and therefore, the cause should be dismissed.

The authority to hear claims arising under various federal statutes and the Constitution presupposes that those claims be of a substantial nature. Thus, although "[t]he test for dismissal is a rigorous one and if there is any foundation of plausibility to the claim federal jurisdiction exists," 13 Wright & Miller, Fed. Prac. & Proc. §3564, at 428, if the claim is frivolous and wholly without merit, *Southpark Square Ltd.* v. *City of Jackson,* 565 F. 2d 338 (5th Cir., 1977), *cert. denied,* ..... U.S. ....., 98 S. Ct. 2849 (1978), or if prior decisions of the Supreme Court clearly foreclose the federal claim, *McLucas* v. *DeChamplain,* 421 U.S. 21 (1975) the Court lacks subject matter jurisdiction.

The Antitrust Allegations

Defendants argue that plaintiffs are barred from bringing any action under the antitrust laws since the regulation of denturists in the form of the Act falls within the perimeters of the state action exception to the federal antitrust laws. Plaintiffs have failed to support their position regarding the sufficiency of their complaint in light of the state action exemption. However, that doctrine should not be applied in a mechanical fashion, *Kurek* v. *Pleasure Driveway & Park District,* 557 F. 2d 580, 589 (7th Cir., 1977), *vacated on other grounds,* 437 U.S. 992 (1978), and the allegations must be examined against the breadth of the exemption.

In *Parker* v. *Brown,* 317 U.S. 341, 352 (1943), the Supreme Court held that the Sherman Act did not apply to a state's anticompetitive regulation when the state imposed such regulations "as an act of government." Since that decision the Court has had occasion to refine the holding in *Parker. See City of Lafayette, Louisiana* v. *Louisiana Power & Light Company,* 435 U.S. 398 (1978); *Cantor* v. *Detroit Edison Company,* 428 U.S. 579 (1975); *Goldbarb* v. *Virginia State Bar,* 421 U.S. 773 (1975). While the result of those decisions has been to narrow the scope of the exemption, it is clear that when a state attempts to regulate a profession, in exercise of its police power, those acts are not susceptible to attack under federal antitrust statutes. *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 362, n. 16 (1977).

Accordingly, the task here is to determine whether the Illinois Act and its enforcement by defendants is an action by the state acting as sovereign and thus immune from federal antitrust restrictions.

In *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), the Supreme Court held that plaintiff's claims under the Sherman Act were barred since the Arizona attorney disciplinary rule in question fell within the *Parker* v. *Brown* exemption. The *Bates* decision provides several significant factors that aid in the determination of the question here. In order that the exemption be applicable it must be determined 1) whether the regulation is truly the action of the State; 2) whether the plaintiffs' claims are ultimately directed at the State; and 3) whether the regulation furthers some policy by the State in order to avoid unnecessary and inappropriate subordination of the federal policy underlying the antitrust laws.

The Illinois Dental Practice Act is a statute enacted by the Illinois legislature. As such, it is a direct and affirmative command by the State concerning a vital aspect of the health and safety of its citizens. There is no question that in enacting the legislation the State was acting as sovereign.

It does not appear that plaintiffs take issue with this finding. However, they claim that in attempting to enforce the Act defendants are acting for their private interests and that it is this activity that runs contrary to antitrust prohibitions. Whatever defendants' motivations in seeking enforcement are, it is clear that plaintiffs' claims are really directed at the State.

The Illinois Act permits the Attorney General, the State's Attorney, or "any resident citizen" to bring suit against any person from unlawfully practicing dentistry. Ill. Rev. Stat. Ch. 111 §2244. As Illinois residents, defendants, whether they be Illinois corporations or individual citizens, are empowered to uphold the statute's provisions. In so doing, they are acting in a sense, not as individual citizens, but as vindicators of the public policy embodied in the Act. Consequently, even though the statute's prohibitions buttress defendants' pecuniary or professional interests, plaintiffs' claims against them are actually directed against the State of Illinois. The fact that the statutory scheme may sanction some private restraint on trade is not sufficient to remove the legislation from the exemption. *See New Motor Vehicle Board of California*

v. *Orrin W. Fox Company,* 47 U.S.L.W. 4017 (Dec. 5, 1978).

There is further support for this conclusion in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). In that case, although the State Bar of Arizona was named as defendant, the Court found that the Arizona Supreme Court was "the real party in interest," 433 U.S. at 361, as it was the latter body that had adopted the disciplinary rule and was charged with its enforcement. Similarly, in this case, the Illinois legislature is responsible for the enactment of the statute in question. As the Arizona Supreme Court delegated some enforcement authority to the State Bar, the Illinois Legislature depends on both public officials and private citizens to aid in the enforcement of the Illinois Dental Practice Act. Accordingly, plaintiffs' claims are ultimately directed at the State of Illinois.

The health and welfare of its citizens is of primary concern to a State. Indeed, the express purpose of the act is to permit only qualified persons to practice dentistry in order to promote the public safety and welfare. Ill. Rev. Stat., Ch. 111 §2202. Like the rule involved in *Bates,* the legislation can be continuously reviewed and amended as the legislature sees fit. Thus, "[o]ur concern that federal policy is being unnecessarily and inappropriately subordinated to state policy is reduced in such a situation." *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 362 (1977).

The Dental Practice Act is precisely the type of legislation that the Supreme Court contemplated in carving out a state action exemption to the federal antitrust laws. It is a regulation designed to protect some general public good or state interest. *New Motor Vehicle Board of California* v. *Orrin W. Fox Company,* 47 U.S.L.W. 4017 (Dec. 5, 1978); *Parker* v. *Brown,* 317 U.S. 341 (1943). Moreover, federal interference is particularly disfavored

when the profession is one that has been traditionally regulated by the state.[14]

The conclusion that the Act falls within the state action exemption to the federal antitrust laws also forecloses plaintiff denturists' cause of action under §1 of the Sherman Act, 15 U.S.C. §1. Plaintiffs' claims that defendants threatened boycotts, retaliation and otherwise interfered with contracts and business relationships of dental laboratories that dealt with plaintiffs amount to no more than attempts to enforce the Act. Similarly, the allegations pertaining to the numerous civil and criminal actions brought against plaintiff denturists are without merit; such activity is specifically authorized. Ill. Rev. Stat. Ch. 111, §2244. In addition, plaintiffs' assertions that they have been deprived of their right to petition the legislature is beyond the reach of the Sherman Act. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961).

Therefore, because the Dental Practice Act and efforts to enforce it fall outside both the Sherman and Clayton Acts, plaintiffs have failed to show that their claims are meritorious since they are precluded by prior Supreme Court decisions. *McLucas* v. *DeChamplain,* 421 U.S. 21 (1975). Consequently, plaintiffs may not invoke this Court's jurisdiction under those statutes.

Equal Protection and Due Process Claims

The allegations of the complaint that refer to a violation of the equal protection and due process rights of

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[14] *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 362 & n. 16 (1976).

Indeed, our decision today on the Sherman Act issue was presaged in Virginia Pharmacy Board v. *Virginia Consumer Council,* 425 U.S. 748, 770 (1976). *We noted there: "Virginia is free to require whatever professional standards it wishes of its pharmacists; it may subsidize them or protect them from competition in other ways. Cf. Parker* v. *Brown,* 317 U.S. 341 (1943)."

plaintiff denturists are based on the initial premise that denturism is a separate and independent profession. Plaintiff denturists claim that allowing them to practice their profession by directly dealing with the public would not endanger the health, safety and welfare of Illinois citizens. Therefore, the argument continues, because the Illinois Dental Practice Act subrogates denturists' ability to practice their profession to the control of dentists, the Act exceeds the constitutional limits of the state's police power.

Plaintiffs are correct in that the grant of authority contained in the Tenth Amendment is limited by the equal protection and due process clauses of the Fourteenth Amendment. However, it is clear that "[t]he day is gone when [a] Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought." *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483, 488 (1955). Similarly in the context of equal protection, unless a statute unnecessarily affects a suspect class or impinges on a fundamental right, a showing that the statute is rationally related to the legislative objective is sufficient to pass constitutional muster. *See Vance* v. *Bradley,* 47 U.S.L.W. 4176, 4177 (Feb. 22, 1979); *Massachusetts Bd. of Retirement* v. *Murgia,* 427 U.S. 307 (1976); *San Antonio Independent School District* v. *Williams,* 411 U.S. 1 (1973).

Plaintiff denturists do not, nor could they refute that standard. Rather, they argue that the right to practice one's profession is a fundamental right. Consequently, they contend that the compelling state interest rather than merely the rational relationship test is the appropriate standard.

We cannot agree that there is a fundamental right to practice a profession free of any legislative prohibitions. It is now firmly established in due process and equal

protection jurisprudence that the fundamental nature of a right does not depend on "comparisons of [its] relative societal significance," but rather whether it is "explicitly or implicitly guaranteed by the Constitution." *San Antonio Independent School District* v *.Rodriguez,* 411 U.S. 1, 33-34 (1973).

Plaintiffs have cited innumerable cases to support their theory that this case involves a fundamental right entitled to strict judicial scrutiny. To the extent that those decisions, e.g., *People* v. *Weiner,* 271 Ill. 74, 110 N.E. 870 (1915), emerge from an era in which courts customarily replaced the legislature's judgment with their own, they are obsolete. *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955); *Lasdon* v. *Hallihan,* 377 Ill. 187, 36 N.E. 2d 227 (1941). To the extent that they deal with rights that have been deemed fundamental, e.g., *Sherbert* v. *Verner,* 374 U.S. 398 (1963) (religion); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969) (interstate travel); *Eisenstadt* v. *Biard,* 405 U.S. 438 (1972) (privacy), they are inapposite.

We believe that our determination as to whether a fundamental right is present here is controlled by *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307 (1976). In that case the Supreme Court held mandatory retirement at age 50 did not violate a state police officer's equal protection rights, noting:

> *This Court's decisions give no support to the proposition that a right of governmental employment per se is fundamental.* [*citations omitted*]. *Accordingly, we have expressly stated that a standard less than strict scrutiny "has consistently been applied to state legislation restricting the availability of employment opportunities." Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 313 (1976), *quoting, Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970).

The fact that *Murgia* involved public employment rather than the pursuit of a private profession does not detract

from the conclusion that plaintiff denturists do not have a fundamental right to practice their profession free of any reasonable restraints. Indeed, in light of the fact that in certain instances public employment gives rise to greater Constitutional guarantees, *cf. Perry* v. *Sindermann,* 408 U.S. 593 (1972), that aspect of *Murgia* buttresses the determination here. Thus, since plaintiff denturists do not have a fundamental right to practice their profession, all that is required is that the provisions of the Illinois Dental Practice Act be rationally related to its purpose.

In this regard plaintiff denturists argue that the Court should not imagine statutory objectives. They claim that in the very least they are entitled to a hearing which would require the state to articulate the wrongs at which the Act is aimed, and affirmatively establish that its terms bear a rational relation to those ends.

A court should not fabricate legislative designs. However, once the statute's objective is articulated, unless the means chosen are wholly irrational, the legislature is given a very wide latitude in fashioning ways to combat the problem at which the statute is directed.

Recently, the Supreme Court has instructed that "*those challenging the legislative judgment* must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance* v. *Bradley,* 47 U.S.L.W. 4176, 4181 (Feb. 22, 1979) (emphasis supplied). Plaintiffs have submitted an overwhelming amount of data supposedly in an attempt to show that there is no factual basis justifying the Act's treatment of denturists.

The plaintiffs have misconstrued the scope of review. Rather than examining all viable alternatives and rendering a decision on our evaluation of the wiser approach, the review must focus solely on the alternative chosen by

the legislature and to determine whether there is any rational basis for that choice.

The express purpose of the Dental Practice Act is to protect the public health and welfare. In addition, the Act purports to further public trust in the dental profession and to ensure that only qualified persons practice dentistry in Illinois.[15]

The means selected to achieve those ends are to require that any services rendered directly to a patient be performed by a licensed dentist. The legislature has devised standards to insure that those persons licensed have received adequate education and training to perform those functions. Ill. Rev. Stat. Ch. 111, §2206.

The legislature could have concluded that since the dentist is charged with the overall dental health care of his patients, he is best qualified to prescribe the most beneficial type of oral prosthesis. The legislature may have decided that the training required of dentists makes them most capable to take impressions, ensure that the necessary extraoral work is done in compliance with the dentist's professional standards and guarantee that the dental fixtures fit properly.

In addition, the Illinois legislature could have found that trust in the dental profession would be promoted only

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[15] Ill. Rev. Stat. Ch. 111, §2202:
LEGISLATIVE DECLARATION — LIBERAL CONSTRUCTION
The practice of dentistry in the State of Illinois is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of Illinois. This Act shall be liberally construed to carry out these objects and purposes.

if all work was performed or, in the least, supervised by the dentist, making the dentist ultimately responsible for the adequacy of the services. Many licensing requirements are enumerated in the Act. Ill. Rev. Stat. Ch. 111, §2206. The legislature might have feared that by permitting non-licensed dental technicians to render direct services to the public, some technicians might have attempted to perform functions which only licensed dentists are qualified to discharge. Moreover, the legislature may have considered that such unlawful activities would be more difficult to police were dental technicians permitted to treat patients independently. That the legislature might have more effectively accomplished its purposes by using less restrictive means is simply immaterial.

Plaintiffs' argument that some dental health care services do not require supervision of a licensed dentist and that denturists are qualified to perform some services which the statute delegates solely to dentists is merely another way of saying that the statute is both over- and under-inclusive. It is elementary that when the standard is the rational relationship test imperfect rationality is not constitutionally fatal. *Vance* v. *Bradley*, 47 U.S.L.W. 4176, 4180 (Feb. 22, 1979); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 316 (1975), *quoting*, *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970); *Williamson* v. *Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955); *Trafelet* v. *Thompson*, No. 78-1941, slip. op. at 8 (7th Cir., March 16, 1979).

There is nothing presented in the complaint that could establish that the state was acting beyond the limits of its police power. The abundant information concerning the laws in Canada and other states that permit denturists to render their services directly to the public, while interesting, is not sufficient to alter the conclusion that plaintiffs' claims under the due process and equal protection clause are unmeritorious. It merely reinforces the determination that state legislatures are better equipped to make judgments about controversial matters affecting

the health and welfare of their constituents.[16] *Vance* v. *Bradley*, 47 U.S.L.W. 4177, 4181 (Feb. 22, 1979); *Trafelet* v. *Thompson*, No. 78-1941, slip. op. at 7 (7th Cir., March 16, 1979).

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[16] This case does not present the first challenge to the Illinois Act. *See Duncan* v. *Ward*, 225 F. Supp. 195 (N.D. Ill., 1963); *People ex rel. Chicago Dental Society* v. *A.A.A. Dental Laboratories, Inc.*, 8 Ill. 2d 330, 134 N.E. 2d 285 (1956); *Lasdon* v. *Hallihan*, 377 Ill. 187, 36 N.E. 2d 227 (1941); *People ex rel. Watson* v. *Spinka*, 58 Ill. App. 3d 729, 374 N.E. 2d 787 (1978); *People ex rel. Illinois Dental Society* v. *Vinci*, 35 Ill. App. 3d 474, 342 N.E. 2d 206 (1976).

In each of those cases the Illinois Dental Practice Act was alleged to violate denturists' equal protection and due process rights. Although Federal Courts are not bound by Illinois Courts' decisions on the United States Constitution, the rationale of these opinions further demonstrate that there is no basis for a claim that the legislative means are not rationally related to the statute's purpose.

In *People ex rel. Chicago Dental Society* v. *A.A.A. Dental Laboratories, Inc.*, 8 Ill. 2d 330, 333-35, 134 N.E. 2d 285, 288-89 (1956), the Illinois Supreme Court, addressing arguments similar to those presented here, stated:

> *The aim of the statute is to restrict the practice of dentistry to licensed dentists with the exception that extra-oral work on dental appliances may be done by non-dentists who are engaged, or employed by dentists to do it. To that end, dental technicians are prohibited to do work on dental appliances directly for the public. The evidence establishes that the knowledge and skill of the dentist is necessary in the diagnosis of the case, the taking of impressions, the issuance of instructions to the laboratory and the testing, fitting and adjustment of a prosthetic denture.*
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> . . .
>
> *In our opinion the power of the legislature is not exhausted when it has provided that there shall be professional supervision at the inception and the conclusion of what is essentially a single process. It may,*

First Amendment Claim

Plaintiff denturists challenge the Illinois Dental Practice Act, Ill. Rev. Stat. Ch. 111, §2218, on the ground that, by prohibiting public advertising about denturists' products and services, it infringes on their right of free speech. Extended discussion of this issue is unnecessary since this claim is clearly without merit.

While commercial speech has been afforded some First Amendment protection, *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748 (1976), the Supreme Court has explicitly stated that First Amendment guarantees are not applicable when the underlying activity which is the subject of the advertisement is illegal. *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 384, (1977). *See also Pittsburg Press Company* v. *Pittsburg Commission on Human Relations,* 413 U.S. 376 (1973).

Under the Illinois Act plaintiff denturists are not free to perform their services directly on patients. In fact, should they fail to obtain a written work order issued by a licensed dentist they are subject to criminal charges for a misdemeanor. Ill. Rev. Stat. Ch. 111, §2219. Plaintiff denturists do not claim that they are barred from publishing articles about the usefulness and benefits of

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[16] (Continued)

if it sees fit, go further and insure that responsibility to the patient shall not be fragmented, and it may focus that responsibility upon a member of the profession which it regulates. By that means, compliance with the requirements that the dentist shall fit the appliance in place and make the necessary adjustments may be enhanced, protection against inferior workmanship and materials and exorbitant prices may be ensured, and the dentist can be certain that the work for his patients is done by those in whose integrity, competence and skill he has confidence.

their profession in newspapers, magazines and professional journals. Indeed, the exhibits attached to their complaint indicate that a plethora of articles has emerged on that subject. Their sole contention is that they are restricted from advertising services that the Act explicitly forbids them from performing. First Amendment protection of commercial speech simply does not extend that far, and therefore plaintiffs' assertion that they have been denied their right to free speech must fail.

Thirteenth Amendment Claim.

Plaintiff denturists' claims that the Illinois Act deprives them of their right under the thirteenth amendment to be free from involuntary servitude are frivolous. To establish a violation of the thirteenth amendment, a showing of compulsion is necessary. *Flood* v. *Kuhn,* 316 F. Supp. 271, 281 (S.D. N.Y., 1970), *aff'd,* 443 F. 2d 264 (2rd Cir., 1971)

Plaintiffs have made no allegation that they are compelled to practice denturism; they are free to engage in any other profession. Also the fact that their work is subjected to the control and scrutiny of a licensed dentist is insufficient to establish that they are unwillingly bound to pursue a particular livelihood. All that is necessary to enable denturists to perform their services directly on their patients is to complete the education and training required by the statute.[17] Therefore, there is absolutely

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[17] Plaintiffs have alleged that two defendants, Suriano and Madonia, have pressured and coerced educators not to provide dental training for plaintiffs. While this type of conduct cannot be sanctioned by the Court, we think that the prohibitions of the thirteenth amendment do not extend to those acts of defendants. *See, Flood* v. *Kuhn,* 316 F. Supp. 271 (S.D. N.Y., 1970), *aff'd,* 443 F. 2d 264 (2d Cir., 1971) (requirement that baseball player play only for a particular team or not at all does not violate thirteenth amendment rights since he is free to pursue another livelihood).

no plausibility to plaintiffs' thirteenth amendment allegations, and consequently, no basis upon which to invoke this Court's jurisdiction.

Other Constitutional Claims

Plaintiffs purport to state claims for violation of 42 U.S.C. §§1983 and 1985(3). To support their cause of action under §1983, plaintiffs claim that defendants have continuously initiated civil and criminal actions against them knowing the statute to be unconstitutional. These allegations are spurious.

The Dental Practice Act expressly authorizes actions against persons who practice dentistry without a license. Ill. Rev. Stat. Ch. 111, §2244. Although plaintiffs allege that the suits were knowingly brought in bad faith, there is no support in fact for their position. Indeed, numerous decisions have upheld the constitutionality of the Act. *People ex rel. Chicago Dental Society* v. *A.A.A. Dental Laboratories, Inc.*, 8 Ill. 330, 134 N.E. 2d 285 (1956); *Lasdon* v. *Hallihan*, 377 Ill. 187, 36 N.E. 2d 227 (1941); *People ex rel. Watson* v. *Spinka*, 58 Ill. App. 3d 729, 374 N.E. 2d 787 (1978); *People ex rel. Illinois Dental Society* v. *Vinci*, 35 Ill. App. 3d 474, 342 N.E. 2d 206 (1976). One would be hard pressed to imagine a situation in which the validity of a statute was more clearly defined and accordingly, there is no merit to plaintiffs' assertion that by bringing lawsuits to enforce a valid statute, defendants have infringed their constitutional rights.

With regard to the §1985(3) claim, the complaint avers that defendants and others have conspired to "harass" laboratory technicians and denturists who profess to be able to safely render their services directly to the public as well as those who have attempted to influence and inform the legislature about defendants' practices. These acts, plaintiffs claim, constitute a violation of their right to free speech and to petition the legislature.

Insofar as the conspiracy to deprive plaintiffs of their right of free speech, their claims are unmeritorious. A similar conclusion concerning the conspiracy to deprive plaintiffs of their right to petition the legislature is compelled.

The complaint contains no facts pertaining to specific tactics used by defendants to bar plaintiffs from obtaining the legislature's attention. Nevertheless, we can infer, from other portions of the complaint, that defendants' lobbying techniques have been more effective. These inferences, however, absent some articulated instances of unlawful conduct, do not establish a violation of §1985(3).

After a careful review of each claim of the complaint,[18] the Court is unable to find a tenable claim for violation of the Constitution or any law of the United States. Accordingly, because no substantial federal question has been presented, this Court is without jurisdiction to entertain this action. The motion to dismiss is granted.

/s/ John Powers Crowley
John Powers Crowley
United States District Judge

Dated: April 6, 1979.

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[18] Plaintiffs have also alleged violations under Illinois law. Having found that there is no federal question jurisdiction, and this being the initial stages of the lawsuit, we decline to exercise pendant jurisdiction over the state law claims.

In The

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY

AT LOUISVILLE

JAMES GAMBREL, et al.,

Plaintiffs,

vs.

KENTUCKY DENTAL BOARD, et al.,

Defendants.

CIVIL ACTION

No. C 78-0184 L(A)

MEMORANDUM OPINION

This action is submitted to the Court on the motion of the defendants to dismiss the complaint or, in the alternative, for summary judgment. The original complainant, James Gambrel, a licensed dental laboratory technician, and other plaintiffs, including consumers of dentures, requested the Court to declare K.R.S. 313.247 and the interpretations placed upon it by the Kentucky Dental Board and Kentucky courts unconstitutional.

Since matters outside of the pleadings have been considered the Court will treat the motion to dismiss as a motion for summary judgment.

The amended complaint added six new plaintiffs to the action and five new defendants and alleges, in substance, that plaintiff, who is licensed to make dentures and artificial teeth under the laws of Kentucky, has been damaged in the amount of $2,000,000 by violation of the Sherman Antitrust Act, 15 U.S.C. 1 et seq., in that defendants are dentists who have conspired to monopolize the dental market in Kentucky for themselves and fellow dentists, by refusing to allow plaintiffs to have prescriptions to fill orders for patients' dentures. As in the original complaint, plaintiffs also request a permanent injunction and that a three-judge court be convened to declare the Kentucky statutes unconstitutional.

The proof in the case reflects that the plaintiffs' basic factual complaints are that it is the practice of some dentists to refuse to give their customers the right to select their own dental laboratory to fill the prescriptions of their dentists with regard to the supplying of dentures. K.R.S. Chapter 313, and more specifically K.R.S. 313.010, defines what persons are to be regarded as dentists, dental hygienists and dental laboratory technicians.

We assume, for the purposes of the motion, that plaintiff Gambrel does, in fact, charge lower prices for the construction of dentures than do some of his competitors, and that persons who have been treated by dentists and who have told the dentists that they wish to have their dentures done by plaintiff have been denied the right to take their prescriptions given them by their dentists to plaintiff and have had to have their dentures altered, repaired or fabricated at a dental laboratory selected by the dentists.

The attacks upon the constitutionality of these statutes is without substance. Many courts have considered challenges to dental statutes similar to K.R.S. Chapter 313. All of the decisions with which this Court is familiar have held that a state may reasonably regulate the practice of dentistry. *State* v. *Chapman,* 70 N.J.L. 339, 57 A. 1133 (Sup.Ct. 1904); *Levine* v. *State Board of Registration and Exam. in Dentistry,* 121 N.J.L. 193, 1 A.2d 876 (Sup. Ct. 1938); *Kunkle* v. *Comm. of Pennsylvania, State Dental Council and Exam. Bd.,* 392 A.2d 357 (Comm.Ct. Pa. 1978); *Cryan* v. *Oklahoma,* 583 P.2d 1122 (Cr. App. Okla. 1978); *Addiego* v. *New Jersey,* 394 A.2d 179 (Sup. Ct. N.J. 1978). In fairness to plaintiffs, it should be noted *Kunkle, Cryan,* and *Addiego* are not decisions of the highest courts of their states.

K.R.S. 313.247(1) requires that no dentist shall use the services of any non-dentist to perform any dental laboratory work without first furnishing such unlicensed person a written prescription or work authorization.

K.R.S. 313.247(3) allows the licensed dentist to have a technician work exclusively within his office to do laboratory work without a prescription.

More significantly, in *Schiller* v. *The Illinois State Dental Society,* Civil Action 78 C 3936 (N.D. Ill. E.D. April 6, 1979), District Judge Crowley held that the Illinois Dental Practice Act which contains provisions very similar to those in the case at bar did not violate any constitutional rights of the denturists under the First, Fifth, Thirteenth and Fourteenth Amendments.

The Supreme Court, in the case of *Williamson* v. *Lee Optical Company,* 348 U.S. 483 (1955) held that an Oklahoma statute which made it unlawful for any person not a licensed optometrist or ophthalmologist to fit lenses to a face or to duplicate or replace into frames lenses or other optical appliances, except upon written prescriptive authority of an Oklahoma licensed ophthalmologist or optometrist was valid. See page 485.

The court stated that while the Oklahoma law might result in needless expense to the consumer it was enough that the legislature thought that there were a number of occasions when a written prescription was necessary to justify this legislation in the fitting of eye glasses. The court held that it was sufficient that there was an "evil" at hand for correction, and that the particular legislative measure was a rational way to correct it.

By the same token, it is apparent that Kentucky law rationally requires a dentist to be responsible, not only for the treatment of his patient, but also for the fitting of appliances to that patient's mouth and for the proper construction of dentures. Having rationally determined that this responsibility lies with the dentist, it was also rational for the legislature to mandate that no repair or fitting of dental structures be completed except upon the prescription of the dentist, and constructed upon or by the use of casts or molds made by the impression taken by a licensed dentist.

Plaintiffs are unable to point to a single case upholding their contentions about the constitutionality of K.R.S. Chapter 347, which plainly relates to the police power of the State to protect the health and welfare of its citizens.

Next we reach the question of whether plaintiffs may validly assert antitrust claims against dentists and dental board who approve the practice of dentists in issuing prescriptions for their patients only to those dental laboratories which they select, rather than a dental laboratory which the patient would prefer. The *Schiller* v. *The Illinois State Dental Society, supra,* plainly holds with regard to similar claims made by dentists in Illinois that such claims are not cognizable under the Sherman Antitrust Act. As Judge Crowley stated in his opinion "the Supreme Court held that the Sherman Act did not apply to a state's anticompetitive regulation when the state imposed such regulations 'as an act of government'." (Citing *Parker* v. *Brown,* 317 U.S. 341, 352 (1943).) See page 8 of Judge Crowley's opinion. Judge Crowley, in his opinion, also called attention to the case of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977) which holds that an antitrust claim by Arizona attorneys was barred since the Arizona attorneys' disciplinary rule fell within the *Parker* v. *Brown, supra,* exemption.

In *Bates* v. *State Bar of Arizona,* the Supreme Court stated that in order to determine whether the *Parker* v. *Brown, supra,* exemption is applicable, the court must determine "1) whether the regulation is truly the action of the State; 2) whether the plaintiffs' claims are ultimately directed at the State; and 3) whether the regulation furthers some policy by the State in order to avoid unnecessary and inappropriate subordination of the federal policy underlying the antitrust laws."

Here, the State of Kentucky has given full authority to dentists to chose dental work laboratories of their own choice. This authority is fully conferred in K.R.S. 313.010(1) and 313.247(1). K.R.S. Chapter 313 is a direct and affirmative command by Kentucky concerning a

matter which is of vital interest to the health and safety of its citizens.

However, the plaintiffs here contend that defendants are using the statutes to practice monopoly for their own private benefit and that, therefore, the *Parker* v. *Brown, supra,* exemption should not be utilized. The problem with that argument is that in every instance complained of by the defendants concerning boycotts, conspiracy, illegal price fixing, and refusal to give prescriptions to plaintiffs to shop at the laboratory of their choice, such actions are authorized by K.R.S. Chapter 313. In Kentucky, as in Illinois, the Kentucky Legislature depends on public officials and on dentists acting as private citizens to aid in the enforcement of K.R.S. Chapter 313. Therefore, plaintiff's claims are ultimately directed at the State of Kentucky, and any relief they seek must be given them by the Legislature of Kentucky.

We have examined cases relied upon by the plaintiffs such as *Goldfarb* v. *Virginia State Bar,* 421 U.S. 773 (1975); *Kathleen R. Reiter* v. *Sonotone Corporation,* No. 78-690, 47 U.S.L.W. 4672 (decided June 11, 1979); *Bates* v. *State Bar of Arizona, supra.*

Goldfarb v. *Virginia State Bar, supra,* involved the setting of fee schedules for title work by attorneys in Virginia. The Supreme Court held that where every lawyer adhered to the fee schedule published by the Fairfax County Bar Association, these activities created a price fixing system. The court also held that the *Parker* v. *Brown, supra,* state action exemption was not available to the attorneys, since it could not be said that the State of Virginia required the anti-competitive activities of the attorneys. In *Goldfarb* the court did recognize that "in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' *United States* v. *Oregon State Medical Society,* 343 U.S. 326, 336 (1952). See also *Semler* v. *Orgeon State Board of Dental Examiners,* 294 U.S. 608, 611-613 (1935)." See page 792.

In *Reiter* v. *Sonotone Corporation supra,* the court held that consumers who purchase hearing aids have standing to bring an anti-trust action against five hearing aid distributors who allegedly have conspired to fix prices of hearing aids.

In *Bates* v. *State Bar of Arizona, supra,* the Supreme Court held that it was a violation of the First Amendment rights of lawyers to prevent them from advertising their professional services in the media. None of these cases are applicable to the case at bar.

Here, the consumers select their own dentist in the first instance; then that dentist proceeds to order dentures from a dental technician in whom he has trust. The statute contemplates that he shall have the absolute right and, in fact, the duty to select whatever dental technician he believes to be qualified to fill the prescription for dentures. The state statutes, K.R.S. 313.010 and 313.247(1), in effect, constitute the dentist as the consumer of the dental appliances furnished by the dental technician.

Finally, it seems to the Court that the remedy of the consumers here is legislative. Their wish is to be able to have dentures furnished them by the lowest price dental technician regardless of their dentist's preference. It is quite conceivable that the legislature could prepare legislation which would mandate that the dentist would merely furnish the prescription and that then the patient would be able to secure his prescription at the dental laboratory of his choice. However, in the absence of such legislation, this Court sees no alternative but to dismiss the complaint and amended complaint filed by the plaintiffs.

A judgment in accordance with this opinion will be entered this day.

Dated: 4-3-80

/s/ Charles M. Allen
Charles M. Allen
Chief Judge

In The

UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

C77-1345A
HOWARD MANDERS, ET AL.

vs.

WALTER B. STILLWELL, ET AL.

ORDER OF COURT

This civil action is brought by 13 individual dental technicians, whose occupation consists solely of the construction, repair and maintenance of dental prosthetics, to challenge the constitutionality and legality of the Georgia Dental Practice Act[1] (the Act), the rules and regulations of the Georgia Board of Dentistry (the Board) and the Code of Ethics of the Dental Profession as adopted by the Board. The defendants are dentists who are joined in this action as individuals and as members of the Board and the Georgia Dental Association, a Georgia corporation comprised of any dentist, licensed by the state of Georgia, who desires to join.

The provisions of the Act which plaintiffs challenge are as follows: Ga. Code Ann. § 84-701 which provides *inter alia*:

> All persons . . . who shall make or repair appliances usable on teeth or as teeth, unless said appliances are ordered by and returned to a licensed dentist; . . . shall be held to be practicing dentistry."

The Board of Dentistry is given the primary duty to license dentists and otherwise regulate the practice of dentistry within Georgia. Ga. Code Ann. § 84-702. In furtherance of that duty, the Board has promulgated regulations which prohibit most contact between patients

[1] Ga. Code Ann. §§ 84-701 *et seq.*; 84-9907, 9909.

and dental technicians. In addition to its power to generally regulate the dental profession, the Board is given the specific power to enjoin the unlicensed practice of dentistry without making the traditional showing there is no adequate remedy at law. Ga. Code Ann. § 84-702. This is because the legislature made the finding that ". . . such unlicensed activities are a nuisance dangerous to the public health, safety and welfare." Ga. Code Ann. § 84-702. Furthermore, the General Assembly has made it a criminal offense to practice dentistry without a license or to practice using the license of another dentist. Ga. Code Ann. §§ 84-9907, 9909.

Generally plaintiff's challenge to these restrictions is based on the argument that they interfere with plaintiffs' right to freely carry on their trade. Plaintiffs acknowledge that few of their number have met the educational requirements necessary to obtain a dental license, but they contend that their training is sufficient enough for them to carry on their trade independent of a licensed dentist. Aside from these policy arguments, plaintiffs' legal theories are difficult to ferret out. The complaint is so rambling and redundant that it comes perilously close to violating the rules of pleading set forth in Fed. R. Civ. P. 8(a). After sifting through many arguments which reflect nothing more than plaintiffs' personal conclusions regarding the wisdom of the state policy as expressed by the legislature in the Dental Act, the Court concludes that plaintiffs' allegations which are cognizable by this Court are as follows: First, plaintiffs allege that the Dental Act virtually destroys their trade by leaving it to the arbitrary needs of the dental profession and thereby denies them equal protection of the law and deprives them of their property without due process in violation of the Fourteenth Amendment[2] to the Consti-

[2] Plaintiffs also allege in their complaint that the Act violates the Fifth and Ninth Amendments to the Constitution. It is well-settled that these provisions apply only to the federal government and are not limitations on the actions of a state.

tution of the United States; second, that the Act unconstitutionally delegates regulatory power to the Dental Board and that the regulations promulgated by the Board also violate plaintiffs' constitutional rights to equal protection because they forbid any contact between patients and dental technicians; third, that the injunctive powers given to the Dental Board when coupled with the possibility for criminal prosecution for the same offense, constitutes a form of double jeopardy and is therefore unconstitutional; fourth, that these injunctive powers deny plaintiffs the equal protection of the laws in that an injunction may be granted to the Board on grounds which are different from those which must be shown by a private individual; and fifth, that the Dental Act creates an unlawful monopoly because dentists are given the exclusive right to practice dentistry as defined by the Act.

The action is presently before the Court on defendants' motion to dismiss for want of federal jurisdiction. It is clear that this action cannot be based on the diversity of the parties. 28 U.S.C. § 1332. However, plaintiffs maintain that no diversity is necessary because this action arises under the Constitution of the United States and federal antitrust laws, 15 U.S.C. § 1 *et seq.* and thereby presents a federal question. 28 U.S.C. § 1331. The Court concludes that plaintiffs' federal allegations are without merit.

The Georgia Supreme Court has previously found that similar regulations of the dental profession were constitutionally sound. *Hartman* v. *Yarbrough,* 214 Ga. 693 (1959); *Holcomb* v. *Johnston,* 213 Ga. 249 (1957). This Court disagrees with defendants' contention that those decisions are conclusively binding on this Court.[3] Not-

[3] In diversity cases, a federal court is bound to apply the law of the state in which it sits; in doing so, the federal court must abide by the decisions of the state courts. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938). However, this doctrine has no application when a federal

withstanding, this Court agrees with the findings of the Georgia Supreme Court.

Plaintiffs' Fourteenth Amendment arguments involve the contention that the Dental Practice Act is unreasonable and unwise. However, it is not the province of courts to draw on their own views as to the wisdom or usefulness of particular legislation in order to decide whether a statute violates the due process clause. Under the system of government created by our Constitution, it is up to the legislatures, not the courts, to decide on the utility of legislation. The doctrine that due process authorizes courts to strike down legislation which it deems unwise has long since been discarded. *Seagram & Sons* v. *Hostetter,* 384 U.S. 35, 47 (1966); *Ferguson* v. *Skrupa,* 372 U.S. 726, 728-30 (1963). The proper test of whether a particular state statute comports with substantive due process is whether the statute involved is rationally related to furtherance of a legitimate state interest. *Railway Express Agency, Inc.* v. *New York,* 336 U.S. 106 (1949). Similarly, the Constitution does not require that a state treat all of its citizens exactly equal; rather, in situations which do not involve already suspect classifications such as race, the courts' inquiry is limited to testing whether the challenged inequality of treatment is rationally related to a legitimate state interest. *Morey* v. *Doud,* 354 U.S. 457 (1957).

In the case at bar, it is beyond debate that the mechanical work of making dental prosthetics is but a small part of the total undertaking of dental care. Today, dental care requires biological, physiological and pathological knowledge along with surgical skill and is intimately

[3] (Continued)
court is called upon to decide federal issues including whether the action by a state violates the Fourteenth Amendment. *Griffin* v. *School Board,* 377 U.S. 218, 231 (1964). In such a situation federal courts have a duty to search out the truth and make independent determinations.

related to the general health of the patient. Equally as clear is the principle that the prosecution of the health and welfare of its citizens is a legitimate state interest. *See Semler* v. *Dental Examiners*, 294 U.S. 608 (1934). This relationship justifies legislative regulation of dentistry, including prosthetic dentistry.

Plaintiffs contend that, even if the general subject is within the legislative competence, the requirements of the Georgia Dental Act are unreasonable and have no rational relation to protecting the public health. Specifically, they cite the fact that no qualifications are established for those who make dental prosthetics. Under the Act, anyone may engage in the trade of making dental prosthetics so long as he works through the brokerage of a dentist. It is argued that the dentist is given what amounts to legislative control over the technician which may be exercised arbitrarily; the success of the technician is dependent on the whims of the dentist.

The Court concludes that it is not unreasonable for the legislature to provide that there shall be professional supervision during what is essentially a single process of patient care. The General Assembly has determined that dental care may be enhanced when a dentist, who has the particular education and training to judge the needs of his patient and the competence and skill of the technician, is left to order prosthetics from a chosen technician and then examine and adjust those items before he places them in the patient's mouth. The statute places no artificial limitation on the practice of dentistry. If anyone seeks to engage in the business of treating the public directly, he need only obtain the necessary education and license.[4] The legislature has regarded the limitations of the Act as necessary to protect the public health and wel-

[4] These considerations also refute plaintiffs' allegation that the Dental Act creates a condition of involuntary servitude in violation of the Thirteenth Amendment to the Constitution.

fare, and this Court is unable to say that such limitations are without foundation. Similarly, the rules and regulations which have been promulgated by the Dental Board pursuant to its authority to regulate the dental profession are rationally related to furthering the goals of public health as set forth in the Dental Practice Act. For this reason, they withstand constitutional attack.

Plaintiffs next argue that Ga. Code Ann. § 84-702, which grants the Georgia Dental Board the power to seek an injunction which would prohibit any unauthorized practice of dentistry is unconstitutional. The challenge is twofold: first, it is argued that the injunction coupled with the criminal sanctions of Ga. Code Ann. §§84-9907 and 9909 for the unauthorized practice of dentistry exposes the defendants to the possibility of double jeopardy; and second, that the statute denies them equal protection of the laws in that it eliminates the need for the Dental Board to make a showing of inadequate remedy at law, a standard which must be met when any other citizen seeks an injunction.

Plaintiffs' first argument regarding double jeopardy is without merit. The doctrine that no person should be twice placed in jeopardy for the same offense is ancient, but it has no application when a person alleges merely that he may be tried in two separate manners for the same offense. Moreover, the principle attaches only to prohibit two criminal trials for the same offense. It is clear that an injunction is an equitable remedy and not a criminal sanction. It does not expose plaintiffs to double jeopardy because they may be enjoined from future violations of the law as well as prosecuted for past violations.

Plaintiffs further argue that this injunctive power should not be used to enjoin the commission of what is defined as crime elsewhere in the statute. Historically, courts of equity have refrained from using their power to prevent the commission of a crime. *See* 5 J. Moore,

Federal Practice ¶ 38.24[3], at 192. However, there have been three general exceptions to this rule: national emergencies, widespread public nuisance and where a specific statutory grant of authority exists. *United States* v. *Jalas*, 409 F.2d 358 (7th Cir. 1969); *Bass Anglers Sportsman's Society* v. *Scholze Tannery, Inc.* 329 F. Supp. 339, 346 (E.D. Tenn. 1971). In the case at bar, the injunctive power of the Georgia Dental Board falls within either of the latter two exceptions. *See* Ga. Code Ann. § 84-701.

Plaintiffs next contend that the creation of a "statutory injunction" which eliminates the need for a showing of inadequate remedy at law constitutes a denial of equal protection since they must make such a showing in order to obtain an injunction. Whether this Act constitutes an encroachment into the power of the judiciary by the General Assembly involves a construction of the Constitution of the state of Georgia and thus is left for the courts of that state to resolve. Plaintiffs' federal constitutional argument is that the Act creates two classes of citizens, those who must show a lack of legal remedy and those who need not. The Court finds this argument to be without merit. Initially, plaintiffs have made no showing that they are similarly situated with the Board. Moreover, any inequality in treatment is rationally related to the protection of the public health. The General Assembly has determined that the practice of dentistry without a license is ". . . a menace and a nuisance dangerous to the public health, safety and welfare." Ga. Code Ann. § 84-702. The Board is given the primary responsibility of protecting the public and it is reasonable to grant to it the power to stop that "nuisance dangerous to the public health" on the terms set forth in the statute.

Plaintiffs' final attempt to present a federal question comes in their allegation that the Dental Act creates a monopoly in violation of the Sherman Act. The Sherman Act makes unlawful "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the

several States," 15 U.S.C. § 1, and makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states." 15 U.S.C. § 2. Plaintiffs argue that the Act has created a monopoly in favor of licensed dentists and has excluded all others from rendering dental services. This contention is nothing more than a challenge to the states' authority to regulate dentistry since, if the state has the authority to regulate dentistry, and in doing so appoint and commission those who are to perform dental services, it must follow that no monopoly in a legal sense can arise from the fact that only the duly licensed individuals can perform dental services. *See Olsen* v. *Smith*, 195 U.S. 343, 345 (1905). The Supreme Court has held that an anti-competitive marketing program which derives its authority and efficacy from the legislative command of the state is not a violation of the Sherman Act because the Act was intended to regulate private practices and not to prohibit the state from imposing a restraint as an act of government. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773-78 (1977); *Parker* v. *Brown*, 317 U.S. 341, 350-52 (1943); *Olsen* v. *Smith*, 195 U.S. 332, 344-45 (1904).

Plaintiffs argue that the broad exemption which has been given to the actions of a state has been whittled away by the recent holdings in *Goldfarb* v. *Virginia State Bar., supra;* and *Cantor* v. *Detroit Edison Company*, 428 U.S. 579 (1977). Plaintiffs' reliance on these cases is misplaced. The decisive factor in both *Goldfarb* and *Cantor* was the finding that the restraints imposed by quasi-public entities did not rise to the level of state action. *Goldfarb*, at 790; *Canton*, at 595. However, both cases reiterated the basic vitality of the state action exception. In the case at bar, there can be no question that the restraints imposed are properly characterized as state action; they find their source in the form of specific legislative enactment. For this reason, it is not subject to the prohibitions of the federal antitrust laws.

In conclusion, for the reasons set forth in this order, the Court finds that plaintiffs' federal constitutional and statutory allegations are without merit and foreclosed by applicable law; there is no room for an inference that the questions sought to be raised can be the subject of a controversy in this Court. There is no federal question presented and therefore this Court lacks the subject matter jurisdiction to hear plaintiffs' complaints. Accordingly, defendants' motion to dismiss are Granted. The complaint is Dismissed.

So Ordered, this 13 day of February, 1978.

/s/ Charles A. Maye, Jr.
United States District Judge